No. 82-1558

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

NORMAN C. GAGNON and
PHILIP C. CHOUINARD,
Appellants

V.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

ON APPEAL FROM A JUDGMENT
OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

MOTION TO DISMISS

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Division

LINDA G. KATZ
Assistant Attorney General

WILLIAM D. LUZIER, JR.
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Tel: (617) 727-2240
(Counsel of Record)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

No. 82-1558

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

NORMAN C. GAGNON and
PHILIP C. CHOUINARD,
Appellants

V.

COMMONWEALTH OF MASSACHUSETTS,
Appellee

ON APPEAL FROM A JUDGMENT
OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

MOTION TO DISMISS

Appellee moves to dismiss this appeal pursuant to Rule 16 of the Rules of the Supreme Court of the United States, on the grounds that it is not within this Court's jurisdiction; the federal questions sought to be reviewed were not properly raised below and were not decided by the court below; the

judgment below rests on adequate non-federal bases; and the appeal does not present a substantial federal question.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Massachusetts Supreme Judicial Court entered after a rehearing in a criminal case. In its initial judgment, the Supreme Judicial Court held that appellants' motions to dismiss indictments charging possession of heroin with intent to distribute should have been granted because of unconstitutional vagueness in the penalty provisions of the statute proscribing such conduct. Accordingly, the court reversed the convictions and remanded the case to the trial court for entry of an order granting the motions to dismiss.

However, after rehearing the case at the Commonwealth's request, the Supreme Judicial Court ordered reversal of the convictions and dismissal of the indictments except as to the lesser included offense of possession of heroin, with respect to which crime the court held that findings of guilty might be entered and sentences imposed.

By this appeal, appellants challenge the constitutionality of their being found guilty and sentenced for the lesser included offense. They do not challenge the constitutionality of the statute proscribing the lesser offense, nor do they challenge the state court's conclusion that possession of heroin is a lesser included offense of possession with intent to distribute.

ARGUMENT

I. THE APPEAL IS NOT WITHIN THIS COURT'S JURISDICTION

As one of the statutory bases for this appeal, appellants purport to rely on 28 U.S.C. §1257(2), which allows review by this court of a state court decision in favor of the validity of a state statute. However, in the court below there is no decision in favor of the validity of a state statute. To the contrary, the court struck down the state statute (Mass. Gen. Laws ch. 94C, §32(a)) which made criminal the possession of heroin with intent to distribute. This was the result appellants sought, and they do not seek review of this aspect of the decision. It is the court's decision on rehearing which is challenged by this appeal. At that stage of the proceeding, the only

question before the court was whether appellants could be resentenced for possession of heroin, under Mass. Gen. Laws, ch. 94C, §34. Appellants did not then, nor do they now, draw into question the validity of that statute. It is therefore clear that 28 U.S.C. §1257(2) does not confer jurisdiction over this appeal.

As an alternative statutory basis for appeal, appellants cite 28 U.S.C. §2102. Since that statute deals only with the priority of cases in this court, it obviously does not confer jurisdiction over this appeal.

Appellee is aware that this improvidently taken appeal might be regarded and acted on as a petition for writ of certiorari, pursuant to 28 U.S.C. §2103. If so, it is requested that the following arguments in support

of this motion to dismiss the appeal be regarded as reasons for denying the petition.

II. APPELLANTS FAILED TO RAISE THE FEDERAL QUESTIONS IN THE STATE COURT

The opinion of the Supreme Judicial Court on rehearing contains no reference to the federal questions appellants seek to bring to this Court. In these circumstances, it will be assumed that the state court's failure to pass upon the federal questions was due to want of proper presentation to that court, unless the aggrieved party can affirmatively show the contrary. See, e.g., Street v. New York, 394 U.S. 576, 582 (1969). In an apparent effort to meet their burden, appellants assert that they made the following arguments in the Supreme Judicial Court:

> (1) to sentence them pursuant to a statute under which they had never been indicted, tried or convicted would violate Due Process of Law under the Fourteenth Amendment; and (2) to subject them to re-sentencing under a statute which charged a lesser offense entirely included within the offense with which they had been previously charged would constitute impermissible double jeopardy under the Fifth and Fourteenth Amendments.

(Jurisdictional Statement, pp. 11-12). However, examination of appellants' submissions to the state court (which are reprinted in the appendix to this motion), reveals that these broad claims were not made, and were not passed on by the court.

Gagnon made only passing reference to "our historical notions of due process." (App. A). He did not cite the federal constitution, nor did he cite cases which expressly relied on the federal constitution. The Massachusetts Constitution contains a provision in

Article 12 which "embrace[s] all that is comprehended in the words 'due process of law' in the Fourteenth Amendment." Pugliese v. Commonwealth, 335 Mass. 471, 475, 140 N.E.2d 476 (1957). Thus, the "historical notions of due process" which appellants sought to invoke should be deemed to relate to the state constitutional protection. Since the record does not clearly show that the state court had the opportunity to decide the federal question in the first instance, that question is not properly before this court. See, e.g., Webb v. Webb, 451 U.S. 493 (1981).

The context in which the due process claim was raised further demonstrates that the decision below resolved only a question of state law. Gagnon argued that simple possession was not a lesser included offense of possession with

intent to distribute. He asserted that the possession element of the greater offense required a connection with the intended distribution, and that these two elements were "indivisible." In his view, the relief sought by the Commonwealth would require the court to "dissect and comingle or butcher portions of separate statutes." Thus, he claimed that he had never been indicted, tried or convicted for the offense of simple possession, and had not been able to prepare a defense to that crime. The alleged due process violation was premised on this analysis. Consequently, the due process claim dissolved when the state court rejected appellants' analysis of state law. Since an indictment and conviction for a greater offense comprehends all lesser included offenses, Commonwealth

v. Gosselin, 365 Mass. 116, 118, 309 N.E. 2d 884 (1974), there was nothing remaining to the due process claim once the state law issue was resolved as it was.

Chouinard made no reference to due process. He did, however, assert a claim of a Fifth Amendment double jeopardy violation. In contrast to Gagnon, Chouinard conceded that the two crimes at issue constituted the same offense. Asserting that defendants had already served a period of incarceration as a result of their conviction of the greater offense, he claimed that re-sentencing for the lesser offense "would constitute a clear violation of the constitutional guaranty against 'multiple punishments for the same offense.'" (Appendix B). This claim did not have to be considered by the state

court because its merit obviously would depend on action to be taken in the future. If on re-sentencing the defendants were given credit for time served, there clearly would be no basis for a claim of multiple punishment. Thus, if the claim of a double jeopardy violation asserted in this appeal is the same as that raised below regarding multiple punishment, it cannot be concluded that this federal claim was resolved by the state court. For the same reason that the claim was premature in the state court, so too, it is not ripe for a decision by this Court either.

No other argument regarding double jeopardy was advanced by Chouinard, and none was suggested by Gagnon. Thus, there is no federal question concerning the double jeopardy clause properly before this Court.

III. THE CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

Appellants suggest three reasons why this court should grant plenary consideration of this appeal. Each is wholly without merit. Appellants first assert that it would violate due process to sentence them pursuant to a statute under which they were never indicted, tried or convicted. This argument overlooks the well-settled principle that "when an indictment charges an offense which includes within it another lesser offense, ... the accused ... may be convicted of the lesser [offense]." Commonwealth v. Gosselin, 365 Mass. 116, 118, 309 N.E.2d 884 (1974). Thus, as noted supra, the due process claim does

not survive the Supreme Judicial Court's holding that possession of heroin is a lesser included offense of possession of heroin with intent to distribute.

Appellant's second argument asserts that "[t]he case law is reasonably clear" that once a defendant has been convicted of a greater offense, a state's attempt to prosecute him for lesser offense, "for whatever reason," constitutes impermissible double jeopardy. But, of course, whether the second prosecution is barred depends entirely on the reason it is being brought. It is a "venerable principle[] of double jeopardy jurisprudence" that "[t]he successful appeal of a judgment of conviction, on any ground other than

the insufficiency of the evidence to support the verdict, ... poses no bar to further prosecution on the same charge." United States v. Scott, 437 U.S. 82, 90-91 (1978). See also, e.g., United States v. DeFrancesco, 449 U.S. 117, 131 (1980); United States v. Tateo, 377 U.S. 463, 465 (1964). Even where a conviction must be reversed for insufficiency of the evidence, there is no constitutional bar to entry of a verdict of guilty of any lesser included offense as to which the evidence was sufficient. See, e.g., Dickenson v. Israel, 482 F.Supp. 1223, 1225-26 (E.D. Wis. 1980), aff'd., 644 F.2d 308 (7th Cir. 1981). It stands to reason that the double jeopardy clause poses no bar

to a defendant's conviction and sentencing for a lesser offense where he has successfully appealed his conviction of the greater on the grounds that the penalty was unconstitutionally vague. A Supreme Court pronouncement of this obvious principle is unnecessary.

Appellants' final argument is that the state court's decision yields an anomaly, in that if the Motion to Dismiss had been granted by the trial court, "the matters would have ended there." However, there is no basis for this assumption. Just as the Supreme Judicial Court after trial ordered dismissal of the indictments except as to the lesser offense, so too, the trial court could have done the same before

trial, with no difference in result. Thus, there is no "anomaly" to be considered by this Court.

CONCLUSION

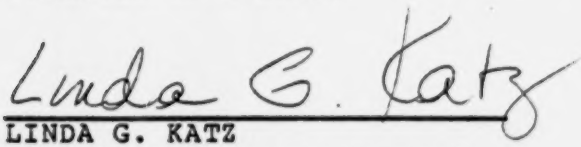
For the foregoing reasons, this appeal should be dismissed.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division

WILLIAM D. LUZIER, JR.
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
Tel: (617) 727-2240
(Counsel of Record)



LINDA G. KATZ
Assistant Attorney General

APPENDIX A

November 23, 1982

Honorable Edward F. Hennessey
Chief Justice
Supreme Judicial Court
New Courthouse
Pemberton Square
Boston, Massachusetts 02108

RE: COMMONWEALTH V. NORMAN GAGNON, ET AL
S.J.C. NO. 2894

Dear Chief Justice Hennessey:

Pursuant to Order of this Honorable Court, the Defendant, Norman Gagnon, chooses to submit this letter in opposition to the Commonwealth's contention that the remedy upon finding that Chapter 94C, §32(a) is void for vagueness should not be the dismissal of the indictments but rather should be, "... an Order of Dismissal on so much of the indictment as charges the Defendant with distribution of or the intent to distribute heroin, and remand the case

to the Trial Court for resentencing pursuant to Chapter 94C, §34, on the lesser included offense of possession of heroin, a statute which has not been rendered unconstitutional on any basis ..."

This argument, which is advanced now for the first time, is based on the assumption that simple possession of heroin, which is proscribed under §34 of Chapter 94C, is a lesser included offense under §32(a). The Defendant, Gagnon, respectfully suggests that upon an analysis of the purpose and wording of §32(a), that assumption is incorrect.

The graveman of §32(a) of Chapter 94C is <u>distribution</u> of heroin. It is directed against the drug "pusher", however, the essence of §34 is <u>simple possession</u>, and is directed against the "user" or the "addict". The conduct

proscribed in §32(a) simply does not contemplate or prohibit mere possession or simple possession. The possession contemplated in §32(a) is that kind which is necessary to put the substance into the regular channels of commerce. It is the marketing of such substances that the statute attempts to reach and possession referred to therein must bear a rational relationship to the objective of this statute, namely, proscription of the manufacture, distribution and dispensing of heroin. It is not every type of possession that constitutes a crime under this statute, but only that type incidental to and necessary to effect the delivery of said substance, with intent to transfer title to said substance, and thus, if a person were in possession for his personal use, an indictment under this statute, even if

it were a valid enactment, upon a failure of any evidence of intent to distribute, could not legally result in a conviction for possession, because the possession would have no connection with an intended distribution. The two elements are indivisible and together constitute the offense. Failure of concurrence can not be converted into separate crimes under the familiar rule contained in the case of Commonwealth v. Ancillo, 350 Mass. 427, 430 (1966).

Furthermore, it appears that the Commonwealth is alleging that a finding of simple possession of heroin is implicit in a conviction under G.L.c.94C, §32(a), however, the wording of that section proscribes two separate modes of criminal conduct, one of which is possession with the intent to manufacture, distribute or dispense, and

the other is to knowingly or intentionally manufacture, distribute or dispense heroin.

The indictment in this case was drawn in the alternative, permitting the fact finder to convict either on a theory of distribution or possession with intent to distribute. Plainly, possession is not a lesser included charge of distribution. Commonwealth v. Tripp.[1/] The manufacture, distribution or dispensing of heroin does not necessarily involve possession of the same. One can manufacture heroin without having it in one's possession by ordering employees, servants or agents to process the same. One can distribute

---

1/ Commonwealth v. Tripp, 14 Mass. App. Ct. 997 (1982), cited by the Commonwealth is inapposite. In Tripp, the defendant was charged only with possession with intent to distribute.

it by order or direction, either verbal or written, by telephone, through a messenger, by rail, air or sea, without ever possessing the same.

Because it is not possible, "to probe the mental processes of the [fact finder]," Commonwealth v. Wilson, 1980 Mass. Adv. Sh., 1627, 1662, there is no way to determine upon which theory the Defendant was convicted. "Ambiguities and doubts are to be resolved in favor of the accused." Commonwealth v. Wilson, supra at 1661. Since the Defendant's conviction under §32(a) could have been based upon his distribution of the substance without actually possessing it, mere possession is not necessarily an element of the offense for which he was convicted. Consequently, possession is not a lesser included offense, since a lesser included offense is one that is

necessarily included in the offense as charged. Commonwealth v. Rodriguez, 1982 Mass. App. Ct. Adv. Sh. 1103, 416 N.E. 2d, 540 (1981). See also Commonwealth v. Mott, 2 Mass. App. 47, 53-54, 308 N.E. 2d 557 (1974). Morey v. Commonwealth, 108 Mass. 433, 434 (1871). Because the Defendant may have been convicted of a crime which does not comprehend the lesser charge suggested by the Commonwealth, he is entitled to a dismissal of the entire charge.

The Defendant has already served nearly one year in jail, a sentence more appropriate for a felony than a misdemeanor. Because the sentencing provisions of §32(a) have been declared void, rendering the entire statute unconstitutional, the Commonwealth now argues that this Honorable Court should dissect and comingle or butcher portions

of separate statutes and resentence the Defendant under the sentencing provisions of §34 charging simple possession, a misdemeanor, without ever having been indicted, tried or convicted under it, and, of course, without ever having been able to prepare a defense to it. Nothing could be more repugnant to our historical notions of due process. In the case of Commonwealth v. Eaton, 2 Mass. App. Ct. 113 (1974), it was argued that to be charged under one statute and convicted of and sentenced under a totally separate crime under a different statute poses grave problems in light of the due process requirement that a Defendant be given notice of the charges against him and an opportunity to defend himself. "It is elementary in the criminal law of this Commonwealth that the offense must not only be proved as

charged, but it must be charged as proved." Commonwealth v. Ancillo, supra, at 430, citing Commonwealth v. Blood, 4 Gray 31, 33 (1855). By not charging the Defendant with simple possession and only charging under §32(a), the Commonwealth has limited the scope of it's indictment to the manufacture, ... or possession with the intent to manufacture, distribute or dispense, and consequently, is not entitled to a conviction based on simple possession (emphasis added). See Commonwealth v. Collardo, 13 Mass. App. Ct. 901, 433 N.E. 2d 487 (1982) wherein the Defendant was indicted under the statute prohibiting the possession of burglarious tools, and the Commonwealth was prevented from obtaining a conviction based on the fact that Defendant possessed master keys which is

a crime covered under a statute separate and distinct from the one under which he was convicted.

Also, the Commonwealth admits in its Petition for Rehearing that this particular issue was, "... not briefed prior to argument or raised by the Court or the parties in oral argument."

The general rule in this Commonwealth is that issues not raised at trial or pursued in available appellate proceedings are waived. Commonwealth v. Pisa, 372 Mass. 590, 425 N.E. 2d 290 (1981). See also Commonwealth v. Bookman, 386 Mass. 657 at 665 (1982).

The sentencing provision of c. 94C, §32(a) applies to both the manufacture, distribution and dispensing of heroin and the possession with intent to manufacture, distribute or dispense

heroin. The entire sentencing provision, having been held void for vagueness, renders the entire statute violative of the due process clause and, therefore, unconstitutional. Consequently, it would be inconsistent with and repugnant to that holding to allow an indictment under that tainted and unconstitutional statute to serve as the basis of a criminal conviction of an allegedly lesser included offense, especially in light of the fact that the Commonwealth is free to bring new indictments under the appropriate constitutional statute against the Defendant, or any other person or persons who have been indicted or convicted under §32(a), which is unconstitutional.

For the above reasons, it is respectfully suggested that the initial

ruling of this Court ordering the Superior Court to allow the Defendants' Motion to Dismiss the indictments against the Defendant was the correct and appropriate remedy and remains the proper remedy in light of it's ruling that the Defendants were indicted and convicted under an unconstitutional statute, and it is respectfully requested that said Order remain in full force and effect, without modification or change, and that the rescript issue forthwith.

Respectfully submitted,

ALOISI & ALOISI

Bruce Miller
Attorney for the Appellant,
Norman Gagnon

BM/js
cc: Dyanne Klein Polatin
Assistant District Attorney
Jerome Segal, Esquire

APPENDIX B

November 24, 1982

Honorable Edward F. Hennessey
Chief Justice
Supreme Judicial Court
New Court House
Boston, MA 02108

Re: Commonwealth vs. Gagnon
and Chouinard
Supreme Judicial Court No. 2894

Dear Chief Justice Hennessey:

Thank you for affording Defense Counsel an opportunity to respond to the Commonwealth's letter of November 10, 1982, concerning the above-cited matter and seeking re-hearing thereof. From the Order of November 17, 1982, we understand that our remarks are to be directed to Paragraph III of the said letter.

The Commonwealth argues that even granting the unconstitutionality of M.G.L. Ch. 94C, Sec. 32(a),

> the remedy should not be the dismissal of the indictments. Rather, this Court could enter an order of dismissal on so much of the indictments as charge the defendants with distribution of, or the intent to distribute, heroin and remand the cases to the trial court for resentencing pursuant to C. 94C, Sec. 34, on the lesser included offense of possession of heroin.

The sole authority cited in support of this contention is Commonwealth vs. Tripp, 14 Mass. App. Ct. 997 (1982); a perusal thereof quickly reveals that it is inapposite.

Tripp arose out of a Trial Judge's denial of Defendant's Motion for a Required Finding of Not Guilty on that portion of a charge of possession with intent to distribute which charged intent to distribute. Defendant argued that the evidence adduced at trial was insufficient as a matter of law to support the charge of intent to distribute. The Appeals Court agreed

with the Defendant and remanded the case to the trial court for entry of a Not Guilty finding on the charge of intent to distribute and resentencing on the finding of possession. Tripp is consistent with previously existing law; it broke no new legal ground:

> It has long been settled that a person can be complained of for a particular crime and convicted of a lesser included crime under the same complaint.

Commonwealth vs. Munoz, Mass. App., 413 N.E. 2d 773 (1980), rev'd in part, 426 N.E. 2d 1161. Indeed, the indictment may be amended as late as the day of trial to state the lesser included offense; Commonwealth v. Munoz, supra; Commonwealth vs. Sitko, 372 Mass. 305 (1977), appeal after remand, 379 Mass. 921 (1980). It is to be observed that in none of these cases was the statute under which the Defendant was indicted

and tried subsequently invalidated; Tripp, as we have observed, concerned itself solely with a question of evidentiary sufficiency.

The instant case, by contrast, is one in which the very statute under the authority of which the Defendants were indicted, tried and convicted was subsequently voided upon a finding of unconstitutionality. The statute being unconstitutional, it follows that the proceedings thereunder were also invalid:

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be elegated authority, contrary to the tenor of the commission under which it is exe of the judicial tribunals to adhere to the latter and disregard the former.

Hamilton, The Federalist, No. 78 (emphasis added); accord: Norton vs. Shelby County, 118 U.S. 425 (1886):

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it never had been passed.

The Norton language has been subsequently modified by the Supreme Court, but chiefly to avoid having to apply all such constitutional decisions retroactively; see e.g. Lemon vs. Kurtzman, 411 U.S. 192 (1973). The statutory basis for the legal proceedings herein having been pronounced void, it follows perforce that those proceedings were invalid.

Were this Court to adopt the suggestion of the Commonwealth, a constitutional anomaly would be produced: proceedings under a void

statute affording a basis for a legitimate sentence! We have found no authority, and the Commonwealth cites none, authorizing such a result. We are not concerned here with the question of whether the Commonwealth could re-indict the Defendants under Sec. 34; nor with that of whether the Commonwealth could have amended the original indictments prior to, or at, the trial of the Defendants, to state a cause of action under Sec. 34. (We note in passing, relative to the latter question, that the Commonwealth was put on notice, prior to trial, of the Defendants' constitutional objections to Sec. 32 (a) and had ample opportunity to amend the indictments or to join the Defendants in their request that the question be reported for a decision; the Commonwealth chose to do neither and

elected to proceed to trial on the indictments as they stood.) The sole question here is whether the Defendants, having gone through the entire process of indictment-trial-conviction-sentencing and having successfully challenged the statutory basis for that process, may now be re-sentenced; we believe that the answer, clearly, must be "No."

There is another problem inherent in the Commonwealth's suggestion -- that of double jeopardy:

> The Fifth Amendment guaranty against double jeopardy protects not only against a second prosecution for the same offense but also against multiple punishments for the same offense.

Gallinaro vs. Commonwealth, 362 Mass. 728 (1973). It has been decided that, at least for double jeopardy purposes, "the charge of possession of heroin and

possession of heroin with intent to distribute constitute the same offense"; Commonwealth v. Clemmons, 370 Mass. 288 (1976). The Defendants herein have served nearly a year in prison as a result of their conviction under Sec. 32(a). From the above-cited cases, it follows that to remand their cases now for re-sentencing under Sec. 34 would constitute a clear violation of the constitutional guaranty against "multiple punishments for the same offense."

Finally, we contend that, whatever merit there might be in the Commonwealth's suggestion, by its failure to brief or argue the point on appeal, the Commonwealth has waived consideration of the same by the Court.

For all of the above reasons, the Defendants respectfully contend that this Court was correct in its original decision in this case to the effect that their indictments should be dismissed, and we hope and trust that the Court will stand by its decision.

Respectfully submitted,
Philip C. Chouinard,
by his attorneys,
SEGAL, EDELSTEIN & BUSSONE

/s/
Jerome A. Segal

/s/
Michael Edward Casey
21 Broadway
Beverly, MA 01915
(617) 927-2211

cc: Dyanne Klein Polatin, Esquire
Bruce Miller, Esquire